

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

Family Law Note

Colorado Reinforces the "Time Rule" Formula for Division of Military Pensions

The Uniformed Services Former Spouses' Protection Act¹ (USFSPA) allows state courts to divide disposable military retirement pay as marital property.² The USFSPA does not, however, establish any formula or method for state courts to use in determining each party's share. Colorado recognizes the following three methods to divide military retirement pay: net present value,³ deferred distribution,⁴ and reserve jurisdiction.⁵ The deferred distribution method is commonly used and

involves establishing the spouse's share through applying the "time rule" formula. The "time rule" formula requires that the monthly benefit be multiplied by the coverture fraction.⁶ The result is then divided in half, and the resulting quotient represents the spouse's share. Determining the figures for the coverture fraction can make a huge difference in the spouse's share. Colorado establishes the numerator of the coverture fraction as the date of the divorce decree or the date of the hearing on disposition of property, if such hearing precedes the date of the decree.⁷

In the case *In re Marriage of Lockwood*,⁸ the Colorado Court of Appeals reinforced the "time rule." The Lockwoods married in 1961 in Germany while he was a military member.⁹ They separated several years later. Mr. Lockwood relocated to the United States without his wife's knowledge and obtained a divorce in Wyoming in 1978.¹⁰ In 1992, Mrs. Lockwood discovered that her husband was living in Colorado. Mrs. Lockwood filed an action in Colorado to divide marital property and challenged the Wyoming divorce decree based on insufficient service.¹¹ The Colorado trial court determined that the Wyoming divorce was void.¹² After a series of appeals, the Colorado courts agreed that Mr. Lockwood obtained the 1978 Wyoming divorce through "outright fraud upon the Wyoming

1. 10 U.S.C.A. § 1408 (West 1998).

2. *Id.* § 1408(c)(1).

3. Net present value is where the court awards a present value to the yet to be determined full pension. The net present value is distributed immediately and offset against other property in the marital estate. *In re Marriage of Kelm*, 912 P.2d 545, 547 (Colo. 1996). This method is not often used in military pension division because it is difficult to assign a present value in most cases, especially where the service member is not yet close to twenty years. Because military retirement benefits are determined by the rank and time-in-service at the time of retirement, it makes present value a difficult determination when the divorce occurs before retirement. In addition, net present value is an offset or "buy out" of the spouse's interest and is paid immediately. This is not generally possible for many military families.

4. In the deferred distribution division of a military pension, the court determines the share of the military retirement pay that is due to the spouse, but the right to collect that share is deferred until a later date, usually the actual retirement of the service member.

5. Reserve jurisdiction also defers collection of the spouse's share of the benefit. Under reserve jurisdiction, the court does not determine any share or attempt to divide the military retirement pension. Instead, the court simply reserves jurisdiction over the pension. After the service member retires, the court can divide the asset.

6. The coverture fraction consists of a numerator that is defined by the number of years or months that the active duty service and the marriage overlap and a denominator that is defined by the number of years or months of total service toward the pension. In a military divorce, the denominator is always at least 20, unless the service member retires under an early retirement program.

7. COLO. REV. STAT. § 14-10-133(5) (1997). This statute establishes when marital property in Colorado is valued. States define this differently, and it is not always defined by statute. Whether the figure is determined at the date of divorce, the date of separation, or the date of filing can make a significant difference. There is no uniformity among the states.

8. No. 97CA0233, 1998 WL 213215 (Colo. Ct. App. Apr. 30, 1998).

9. *Id.* at *1.

10. *Id.* Mr. Lockwood filed for divorce in Wyoming and attempted service by publication on Mrs. Lockwood, who was still residing in Germany. The supporting affidavit listed her last known address as Berlin, Germany. Three months later, he asked for default based on Mrs. Lockwood's failure to respond. At the time of default, the accompanying affidavit stated that there was no known address for the wife in spite of search and reasonable diligence. The default was granted on 7 December 1978. Mr. Lockwood remarried in 1979. *In re Marriage of Lockwood*, 857 P.2d 557, 558-59 (Colo. Ct. App. 1993).

court” and refused to recognize the divorce.¹³ The Colorado court issued a divorce decree in 1996 and held a separate hearing on division of the marital property.¹⁴ Mr. Lockwood’s military retirement was one of the marital assets for division.

The court determined that it would use the deferred distribution formula and apply the “time rule” formula to divide the military retirement pay.¹⁵ Apparently, in an attempt to fashion an equitable distribution, however, the court used the 1992 date when Mrs. Lockwood filed for divorce in Colorado rather than the 1996 date of divorce to determine the numerator of the coverture fraction.¹⁶ On appeal, the Colorado Court of Appeals held that equitable concerns are relevant only in deciding which of the three methods to use in dividing the retirement pay. The “time rule” formula cannot be altered.¹⁷ Therefore, the court remanded the case for the trial court to establish Mrs. Lockwood’s portion of the military retirement using the 1996 decree of divorce date.¹⁸

This case points out the importance of understanding the coverture fraction and how the state court where the divorce occurs uses that fraction. Although the USFSPA does not establish any formula, most courts use the coverture fraction in some manner to divide the military retirement pay. In addition, this case is a lesson in general family law issues of divorce.

Although Mr. Lockwood had a facially valid divorce decree, the fraud he perpetrated in the service on Mrs. Lockwood resulted in a void decree under Wyoming law.¹⁹ It also cost him dearly monetarily.²⁰

Lockwood provides good lessons for the service member’s counsel and the spouse’s counsel. The service member’s counsel should carefully consider the possible outcome before taking short cuts to achieve the client’s end. The spouse’s counsel should not give up without checking out some basic facts. Major Fenton.

Consumer Law Note

The Truth in Lending Act Means What It Says—You Only Have Three Years to Rescind

The Truth in Lending Act²¹ (TILA) provides a three-day “cooling off period” during which a consumer may rescind a non-purchase money credit transaction that is secured by his principal residence.²² The TILA also extends this right to rescind for up to three years if the creditor fails to provide certain material disclosures.²³ This provision helps to protect an individual’s home in many contexts.²⁴ Many consumer advo-

11. *Lockwood*, 1998 WL 213215, at *1. The Wyoming court file contained a letter from Mrs. Lockwood that indicated that she had received no notification and could not be present at a 5 December 1978 hearing. The Wyoming decree made no mention of the letter. In addition, Mrs. Lockwood made inquiries in 1979 on how to set aside the decree, but she took no action until she found Mr. Lockwood’s whereabouts in Colorado in 1990. *Lockwood*, 857 P.2d at 559.

12. *Lockwood*, 1998 WL 213215, at *1. In her attempt to show insufficient service, Mrs. Lockwood produced uncontroverted evidence that her address had remained the same since 1968 and that Mr. Lockwood knew the address. Included in this evidence was the Wyoming divorce decree that had been mailed from Mr. Lockwood’s attorney’s office to her street address in Berlin four days after the decree was entered. *Lockwood*, 857 P.2d, at 559.

13. *Lockwood*, 1998 WL 213215, at *1.

14. *Id.*

15. *Id.* Neither party objected to this method of distribution. *Id.*

16. *Id.* at *2. The court determined that, in light of Mrs. Lockwood’s delay in pursuing the claim, equities weighed in favor of using the filing date for the Colorado divorce in 1992. *Id.*

17. *Id.* at *3.

18. *Id.* at *4.

19. Colorado looked to Wyoming law to determine whether the divorce was void or voidable under the circumstances of improper service. Once the court determined that the divorce was void under Wyoming law, there was no full faith and credit due the decree. Mr. Lockwood asserted several equitable defenses that the court also considered and dismissed.

20. Ironically, if Mr. Lockwood had served Mrs. Lockwood properly in 1978, the military retirement would not have been divisible. The USFSPA was passed in 1982 and effective 1 February 1983. Mrs. Lockwood waited until 1992 to file for divorce in Colorado and to assert her rights to the pension. Had she been properly served and waited until 1992 to try to divide the pension, she could not have reopened the matter because the USFSPA was amended in 1990 to prevent retroactive application to cases that were decided prior to July 1981.

21. 15 U.S.C.A. §§ 1601-1667e (West 1998).

22. *Id.* § 1635(a).

23. *Id.* See 12 C.F.R. § 226.23(a)(3) (1997).

24. See Consumer L. Note, *The Truth-in-Lending Act Can Help With Home Improvement Contracts*, ARMY LAW., May 1997, at 65.

cates use this provision on behalf of homeowners “to defend against enforcement of high rate, ‘predatory’ home equity loans.”²⁵ This defensive use is referred to as “rescission by recoupment.”²⁶ A unanimous United States Supreme Court recently took the defensive use of this tool away from consumers and their advocates in *Beach v. Ocwen Federal Bank*.²⁷

“[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff’s action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.”²⁸ Essentially, states, by statute or common law, allow a civil defendant to attack a plaintiff’s claim by using defects in the transaction that form the basis of the claim, without regard to the statute of limitations.²⁹ The rationale for this is “that the purposes of statutes of limitation are not served by allowing one party to enforce claims while denying the other’s related defenses.”³⁰ Many courts have considered TILA rescission rights to fall within the concept of “recoupment.”³¹

David and Linda Beach faced a foreclosure action in 1992 for failing to pay their mortgage.³² In 1986, they built a house in Florida using a secured loan and later refinanced the home through a different lender.³³ After defaulting in 1991, the Beaches raised rescission under the TILA as an affirmative defense to the bank’s foreclosure.³⁴ Using recoupment, the

Beaches claimed that the bank had failed to give proper TILA notices at the time of the loan. Based on their argument, the bank’s failures entitled them to rescind the transaction despite the running of the three-year period allowed for rescission.³⁵

The Florida circuit court allowed the Beaches to offset their actual damages from the bank’s claim, but denied their attempt to rescind the mortgage.³⁶ The court gave two reasons for this decision. First, the transaction was a “residential mortgage transaction” and, second, the three-year time period to rescind had expired in 1989.³⁷ The Beaches appealed to the Florida Supreme Court, which decided only the issue of rescission rights, and found that Congress intended to limit the rescission period to three years.³⁸ The court distinguished the Beaches’ case from other recoupment cases by finding that the rescission provision of the TILA was not a statute of limitation but, rather, a statute that extinguished the right.³⁹ The U.S. Supreme Court granted certiorari because the Florida decision conflicted with the decisions of several other courts.⁴⁰

Justice Souter, writing for a unanimous U.S. Supreme Court, conceded the general rule that statutes of limitations do not extinguish recoupment claims.⁴¹ The Court, however, agreed with the Florida Supreme Court that the three-year limit on rescission rights was not a statute of limitations.⁴² It found that the language of 15 U.S.C. § 1635(f), which states that the right

25. *Supreme Court Bars Most Rescission By Recoupment*, 16 NCLC REPORTS, BANKRUPTCY AND FORECLOSURES EDITION (Nat’l Consumer L. Ctr.), Mar./Apr. 1998, at 17 [hereinafter NCLC REPORT].

26. *Id.*

27. 118 S. Ct. 1408 (1998).

28. *Bull v. United States*, 295 U.S. 247, 262 (1935), *quoted in* *United States v. Dahm*, 494 U.S. 596, 599 (1990). *See* NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING § 6.6.3.3.1 (1995 & Supp. 1997) [hereinafter TRUTH IN LENDING].

29. *See Using Bankruptcy to Recoup Consumer Damage Claims After the Statute of Limitations Has Run*, 13 NCLC REPORTS, BANKRUPTCY AND FORECLOSURES EDITION (Nat’l Consumer L. Ctr.), Mar./Apr. 1995, at 19.

30. TRUTH IN LENDING, *supra* note 28.

31. *Id.*

32. *Beach*, 118 S. Ct. at 1410.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1410-11.

37. *Id.* at 1411.

38. *Id.* (citing *Beach v. Great W. Bank*, 692 So. 2d 146 (1997)).

39. *Id.* at 1411.

40. *Id.* (citing *In re Barsky*, 210 B.R. 683 (E.D. Pa. 1997); *In re Botelho*, 195 B.R. 558 (D. Mass. 1996); *In re Shaw*, 178 B.R. 380 (D. N.J. 1994); *Federal Deposit Ins. Corp. v. Ablin*, 532 N.E.2d 379 (1988); *Community Nat’l Bank & Trust Co. of N.Y. v. McClammy*, 525 N.Y.S.2d 629 (1988); *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796 (Colo. 1984) (en banc)).

“shall expire,” provides a limitation on the life of the underlying right.⁴³ The Court contrasted this provision with a statute of limitations that merely limits the enforcement mechanism of the right.⁴⁴ Moreover, in 15 U.S.C. § 1640, Congress specifically addressed recoupment when establishing a one-year statute of limitations for commencing TILA damage actions. This “unmistakably different treatment” of the rescission right and the general TILA statute of limitations caused the Court to apply “the normal rule of construction” that these different treatments “reflect a deliberate intent on the part of Congress.”⁴⁵ Thus, the Court found that TILA rescission could not be raised after the three-year period had run, virtually eliminating this claim as a recoupment defense.⁴⁶

Beach could have a far-reaching impact on consumers. With the proliferation of the home-equity market, TILA rescission rights have become an important weapon in the arsenal of consumer advocates.⁴⁷ Often, lenders charge exorbitant interest rates for home equity loans, and the stake is the consumer’s home. “Unfortunately, consumers who are the victims of abusive high rate loan schemes rarely come forward for legal help until they have trouble paying their mortgage and foreclosure is looming.”⁴⁸ Since this will very often occur more than three years from the loan date, the loss of rescission as a recoupment defense is a major defeat for consumers.⁴⁹

Legal assistance practitioners should reemphasize to soldiers the dangers of high rate loans, particularly in the home equity context where failure to pay can affect the roof over the heads of the soldier’s family. While consumer protections have

come a long way in the last twenty-five years, the buyer is still well advised to be cautious before entering any financial transaction. *Beach* reminds practitioners that consumer protection statutes and case law will not always provide relief. Even when there is protection, it is always better to avoid problems rather than trying to fix them after the fact. Major Lescault.

USERRA Note

How Do You Get Your Job Back?

In a case of first impression, *McGuire v. United Parcel Service, Inc.*,⁵⁰ the U.S. District Court for the Northern District of Illinois spelled out how a military reservist can be reinstated to his preservice job. According to *McGuire*, the returning service member has the burden of establishing whether he has satisfied the requirements of the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵¹ for reinstatement.⁵²

The requirements for being reinstated under the USERRA are: (1) the service member must give the employer advance written or oral notice of the service-related absence;⁵³ (2) the cumulative length of absence must be less than five years;⁵⁴ (3) the service member must receive an honorable discharge from the active military duty;⁵⁵ and (4) if the period of active military service is less than 180 days, the service member must apply for reemployment within fourteen days after completion of service.⁵⁶

41. *Beach*, 118 S. Ct. at 1411.

42. *Id.* at 1412.

43. *Id.*

44. *Id.*

45. *Id.* at 1412-13.

46. While the Court eliminated the federal basis for a recoupment action based on TILA rescission, it stated in a footnote that “[s]ince there is no claim before us that Florida law purports to provide any right to rescind defensively on the grounds relevant under [the TILA], we have no occasion to explore how state recoupment law might work when raised in a foreclosure proceeding outside the three-year period.” *Id.* at 1413 n.6.

47. See generally NCLC REPORT, *supra* note 25; TRUTH IN LENDING, *supra* note 28, §§ 6.2.1, 6.6.2, 6.6.3, 10.6.2.

48. NCLC REPORT, *supra* note 25, at 17.

49. *Id.*

50. No. 97-C-0232, 1997 WL 543059 (N.D. Ill. Aug. 28, 1997).

51. Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C.A. §§ 4301-4333 (West 1998).

52. *Id.* § 4312.

53. *Id.* § 4312(a)(1). The service member must have been employed prior to activation. *Id.*

54. *Id.* § 4312(a)(2).

55. *Id.* § 4304.

McGuire had been an air sales representative for United Parcel Service's (UPS's) Chicago office for over two years when he orally notified his supervisors in November 1995 that he might be activated for an extended period of active military duty. During his entire period of employment with the company, he was a member of the Army Reserve.⁵⁷ He provided UPS with a written notice of military duty on 22 December 1995 and faxed a copy of his military orders to UPS on 2 January 1996. United Parcel Service did not replace McGuire during his absence but had other employees cover his duties. On 27 April 1996, McGuire sent his supervisor, Mr. John Segovia, a letter requesting information on reemployment upon his discharge from active duty. Apparently, Segovia did not receive the letter, but when McGuire called to follow up on 8 June 1996, another supervisor assured him that Segovia had the letter and would contact him.

McGuire was honorably discharged from active duty on 30 June 1996. On 11 July 1996, McGuire wrote Segovia another letter requesting "the procedures to get my job back."⁵⁸ McGuire also asked, "If you cannot answer this please pass it on to someone who can."⁵⁹ Mr. Segovia asked Mr. Ed LeBel of the UPS Human Resources Department for guidance. LeBel told Segovia that all McGuire had to do to be rehired was submit an employment update form.

On [16 July] 1996, Segovia sent the following letter to McGuire:

Dave--
The law specifies that there are no requirements for reemployment. Please touch base w/ Ed LeBel (HR) upon your return. Look to see you--
John Segovia
Resp. Ex. K.⁶⁰

McGuire received Segovia's letter the next day, but he never contacted the UPS Human Resources Department as directed. Mistakenly, McGuire believed that Segovia's letter was a letter of termination. McGuire attempted to contact Segovia by phone over the next few days, but never requested his job back or indicated that he believed he had been fired.

On 18 July, Segovia received a letter from an attorney who was assisting McGuire. The lawyer informed Segovia that McGuire believed that UPS was refusing to rehire him. Segovia called the lawyer and told him that McGuire was not fired and that all McGuire had to do was to report to the UPS Human Resources Office and he would be reinstated. The lawyer passed on Segovia's message to McGuire. Incredibly, McGuire never contacted the UPS Human Resources Office or visited the UPS facility to inquire about reinstatement.

On 13 January 1997, McGuire filed a court petition for reinstatement by UPS and alleged violations of the USERRA. United Parcel Service moved for summary judgment on the grounds that McGuire failed to apply for reinstatement under USERRA.⁶¹

The court framed the dispositive issue as whether McGuire had submitted an application for reemployment as required by the USERRA reinstatement provisions.⁶² The court determined that what constituted a proper application for reinstatement under the USERRA was a question of first impression.⁶³ Since there were no cases interpreting this provision of USERRA,⁶⁴ the court looked back to reinstatement application requirements under the Veterans' Reemployment Rights Act (VRRA).⁶⁵ The court noted that Congress directed that, where the statute sections of the VRRA and USERRA are similar, case law interpreting the predecessor statute should be "given full force and effect in interpreting these provisions."⁶⁶ The court determined that, while application for reemployment involves "more than a mere inquiry, a written application is not required in every sit-

56. *Id.* § 4312 (e)(1) (C).

57. McGuire had less than five years of reserve active duty time while employed with UPS.

58. *McGuire v. United Parcel Service, Inc.*, No. 97-C-0232, 1997 WL 543059, at *2 (N.D. Ill. Aug. 28, 1997).

59. *Id.*

60. *Id.*

61. *Id.* at *3.

62. 38 U.S.C.A. § 4312(e)(1)(C).

63. *McGuire*, 1997 WL 543059, at *3.

64. *Id.* at *3 n.5.

65. Pub. L. No. 93-508, 88 Stat. 1594 (1974). The reemployment application requirement section of the VRRA was last codified at 38 U.S.C. § 2021. Neither statute specified any specific application procedure or application requirement for reinstatement. See *Thomas v. City & Borough of Juneau*, 638 F. Supp. 303 (D. Alaska 1986) (noting that where the employer was aware that a veteran was reapplying for reemployment, the employer had a legal obligation to rehire him).

66. *McGuire*, 1997 WL 543059, at *3 n.5. See H.R. Rep. No. 103-65, at 21 (1993), reprinted in 1994 U.S.C.A.N. 2449, 2451-52.

uation.”⁶⁷ The court determined that a case-by-case examination of the facts, “based upon the intent and reasonable expectations [of the parties], in light of all the circumstances,” was the appropriate standard of review.⁶⁸

The court reviewed several cases under the VRRRA where service members were found to have improperly requested reinstatement upon return from active duty⁶⁹ and conceded that McGuire had made more than a “mere inquiry” about reemployment.⁷⁰ McGuire sent several letters back to his supervisor and followed up with several telephone calls. Still, the court found that McGuire failed to submit an application.⁷¹ The court looked at the exchange of letters between Segovia and McGuire. The court determined that McGuire failed to use due diligence to obtain reemployment once he was put on notice that Segovia did not have authority to hire him back and that he needed to contact the UPS Human Resources Office.⁷²

Finally, the court noted that McGuire’s misunderstanding regarding his reemployment status did not equal employer refusal to rehire. United Parcel Service never denied or discouraged McGuire’s right to be rehired. When McGuire’s attorney notified UPS of his client’s concern that he was being denied reemployment, Segovia contacted the lawyer and reassured him that all his client needed to do was report to the Human Resources Office. As the court observed, “At a certain point the responsibility to see that one’s reemployment rights are observed falls on the employee.”⁷³ The court concluded that summary judgment was appropriate, as McGuire failed to fol-

low-up on UPS’s letter directing him where and to whom he needed to reapply for his civilian job.

While this case has limited precedential value, it is instructive as to what the courts expect of returning veterans and reservists who invoke their reemployment rights. Service members should contact their employers in writing, by certified mail, and demand reinstatement to their civilian employment within the statutory report back period. The letter should be sent to their companies’ directors of human resources or the appropriate personnel within the company who have clear authority to rehire service members, with copies to their immediate supervisors. If necessary, service members should follow up their letters with personal visits to their employers’ human resources offices upon discharge and should request USERRA reinstatement to their preservice employment. While there is no specific reemployment application form, the letter should leave no doubt to the employer that the service member wants reinstatement to his civilian job, in accordance with USERRA.⁷⁴

If there is any misunderstanding about reemployment, the service member should immediately contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) National Ombudsman, or the Department of Labor Veterans and Employment Training Service, to resolve the misunderstanding.⁷⁵ If the service member waits beyond the statutory period to seek reemployment, the employer does not have an obligation to rehire him.⁷⁶ Lieutenant Colonel Conrad.

67. *McGuire*, 1997 WL 543059, at *3. See *Baron v. United States Steel Corp.*, 649 F. Supp. 537, 540 (N.D. Ind. 1986).

68. *McGuire*, 1997 WL 543059, at *3. See *Shadle v. Superwood Corp.*, 858 F.2d 437, 438 (8th Cir. 1988).

69. *McGuire*, 1997 WL 543059, at *3. See *Shadle*, 858 F.2d at 440 (holding that a service member’s mere visit to the employer guard shack to request employment application and two calls to supervisor are an insufficient request for reinstatement); *Baron*, 649 F. Supp. at 540 (N.D. Ind. 1986) (holding that a service member’s advisement to his employer that he would seek reemployment if he did not get into college was an insufficient request for reinstatement); *Lacek v. Peoples Laundry Co.*, 94 F. Supp. 399, 401 (M.D. Pa. 1950) (holding that a service member’s casual visit to his workplace and a general discussion about working conditions are an insufficient request for reinstatement). See also U.S. DEPARTMENT OF LABOR, VETERANS’ REEMPLOYMENT RIGHTS HANDBOOK, ch. 7 (1986).

70. *McGuire*, 1997 WL 543059, at *3.

71. *Id.*

72. *Id.* See *Hayse v. Tennessee Dep’t of Conservation*, 750 F. Supp. 298, 304 (E.D. Tenn. 1989) (noting that an employer “has a right to expect that notice be received by someone who is in a decision-making position, for example, someone who is able to hire the returning veteran.”). See also H.R. REP. 103-65, at 29 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2462 (explaining that an application must be made verbally or in writing to the employer or an employer’s representative “who has either the authority to act on the application or who is in a position to forward the request to someone who has the authority”). Arguably, Mr. Segovia, as McGuire’s supervisor, was in a position to forward his reemployment request, which should have met the requirements of the statute.

73. *McGuire*, 1997 WL 543059, at *3. “Common sense dictates that an employer cannot be expected to give every inquiry, regardless of how slight, full consideration and attention.” *Baron*, 649 F. Supp. at 541.

74. Model letters to employers are available on the Legal Automation Army Wide System bulletin board service in the Reserve and National Guard file section for downloading, and via the Army JAGCNET internet site at <http://www.jagcnet.army.mil>. Additional sources for information on reemployment rights are the Department of Defense National Committee for Employer Support of the Guard and Reserve (NCESGR) website at <http://www.ncesgr.osd.mil>, and the Department of Labor website at <http://www.dol.gov/dol/vets>. Army judge advocates and civilian legal assistance attorneys are precluded from contacting employers directly on USERRA matters involving individual service members. See U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6e(2) (10 Sept. 1995).

75. The NCESGR National Ombudsman may be contacted by calling (800) 336-4590 for assistance in mediating reemployment rights with employers. Department of Labor assistance may be received by calling (202) 219-9110.

Contract Law Note

Decision to Terminate a Travel Contract for Convenience Results in a Breach of Contract

In *Travel Centre v. General Services Administration*,⁷⁷ the General Services Board of Contract Appeals (GSBCA) found that the General Services Administration's (GSA) decision to terminate a travel services contract for convenience was done in bad faith, resulting in breach of the contract. After losing at the GSBCA, the GSA sought reconsideration, but the GSBCA rejected the GSA's motion for reconsideration. The GSBCA held, in part, that when a government official has information in his possession that is material to a pending procurement and fails to provide that information to offerors, the government official has not shown the good faith that people who do business with the government expect.⁷⁸

The subject procurement required the successful offeror to establish and to operate a travel management center for federal agencies located in New England. The solicitation specified that the successful offeror would serve as the preferred source for federal agencies that needed airline tickets, lodging, rental vehicles, and other travel services. The winning contractor would receive commissions from the services it provided.⁷⁹

The solicitation required an indefinite delivery, indefinite quantity (IDIQ) type of contract with a minimum guaranteed revenue of one hundred dollars. During the pre-award process, the incumbent contractor notified GSA that its largest government customer, Department of Defense (DOD)-related agencies,⁸⁰ awarded its own travel services contract to another contractor. Therefore, the DOD-related agencies would not be using the GSA contract. According to the GSBCA:

[The] GSA never informed offerors of this important information—information which directly contradicted the estimates of expected business contained in the solicitation upon which offerors had based their proposals. [The] GSA simply awarded a contract to Travel Centre for the states of Maine and New Hampshire. When expected business failed to materialize, Travel Centre was forced to close its business. [The] GSA then terminated the contract for default, changing the termination to one for the convenience of the Government in April 1997.⁸¹

In the underlying decision, the GSBCA noted that courts and boards have struggled mightily with the question of where to draw the line between a government breach of a contract and the legitimate use of the government's right to terminate a contract for convenience.⁸² Before *Torncello v. United States*,⁸³ courts had regularly held that terminations for convenience would only be considered a breach of contract when government officials acted in bad faith or abused their discretion.⁸⁴ In a plurality opinion in *Torncello*, the court further limited the government's power to terminate a contract for convenience by adopting a "change in circumstances" test. That is, when the circumstances of a contract have not changed after award of the contract, the government cannot rely on the termination for convenience clause to avoid a breach.⁸⁵ Subsequent case law has eroded the limitation established in *Torncello*, culminating with *Krygoski Construction Co. v. United States*,⁸⁶ which basically returned the law to its pre-1982 status. According to the GSBCA, "[g]iven the current state of the law . . . we must determine whether [the] GSA's termination for convenience of Travel Centre's contract as a result of a severely deficient estimate was in bad faith or constituted an abuse of discretion."⁸⁷

76. 38 U.S.C.A. § 4312(e)(3) (West 1998). Such employees do not automatically forfeit all their rights under the USERRA, but they are subject to any employer policies or practices regarding workers who are absent from the workplace without permission. *Id.*

77. GSBCA No. 14057, 98-1 BCA ¶ 29,541.

78. *Id.*

79. *Id.*

80. *Id.* The DOD business accounted for more than half of the business from the State of Maine.

81. *Id.*

82. *Id.*

83. 681 F.2d 756 (Ct. Cl. 1982). *Torncello* stands for the proposition that when the government enters into a contract knowing full well that it will not honor the contract, it cannot avoid a breach claim by using the termination for convenience clause. In *Torncello*, the government entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another contractor. When the contractor complained that the government was breaching the contract by satisfying its requirement from the cheaper source and ordering nothing from it, the government claimed its actions amounted to a constructive termination for convenience. The court held that the government could not avoid the consequences of breach by hiding behind the termination for convenience clause. *Id.* at 772.

84. See, e.g., *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977).

85. *Torncello*, 681 F.2d at 772.

The GSBCA analogized the instant case to *Atlantic Garages, Inc.*⁸⁸ In *Atlantic Garages*, a faulty estimate of the number of vehicles that would need to be repaired during the year suffered from the same basic defect as the faulty estimate here—the Government’s actions were sufficiently irrational as to support a finding that it knew or should have known that the estimate was not based on all relevant information. Also, as here, the irrationally-arrived-at estimate (and the resulting lack of income) caused the contractor to lose money and fail to meet its financial obligations.⁸⁹

The GSBCA held that the government’s actions in arriving at such an irrational estimate constituted a breach of the contract. Specifically, it stated that “[w]hatever risks a contractor takes should not include the risk that the contract will be based on an irrationally contrived estimate.”⁹⁰

In the instant case, the GSBCA concluded that the GSA irrationally-arrived-at estimate was not a run-of-the-mill mistake. According to the GSBCA, the GSA awarded the contract to Travel Centre knowing that its estimate was vastly overstated and knowing that Travel Centre had based its offer on the erroneous information.

By not telling offerors that half of the estimated sales for Maine would not be attainable, [the] GSA withheld crucial information material to an offeror’s decision whether to submit a proposal at all and, if so, how to structure it. Under such circumstances, whether [the] GSA actually knew about important additional relevant information, or recklessly disregarded it (an explanation which we do not find credible but, in any event, amounts to the same thing), potential injury to Travel Centre was present from the outset. We reject [the] GSA’s argument that

such behavior lacks the bad faith element necessary to finding breach.⁹¹

The GSA took the position that there was no breach for the following reasons: (1) it was an IDIQ type of contract; (2) it had a guaranteed minimum of one hundred dollars of revenue; (3) it did not guarantee that any specific agencies would use the contract; and (4) the contractor actually received more than one hundred dollars of revenue.⁹² The GSBCA disagreed with the GSA’s position. Initially, the GSBCA noted that it had serious doubts that Travel Centre actually accepted the risk that the GSA had misled it as to the amount of business it might expect to receive under the contract. More specifically, Administrative Judge Robert W. Parker stated in his opinion that “where the Government knows or has reason to know that the contractor has no chance of achieving the estimated quantity of sales, and fails to disclose that fact prior to entering into the contract, the term ‘risk’ is a misnomer.”⁹³

Judge Parker distinguished the instant contract from an ordinary IDIQ contract. In an ordinary IDIQ contract, the government promises nothing more than to purchase the minimum quantity. In the instant solicitation, the GSA advised that the successful offeror would be the preferred source for federal agencies in the region and mandated that offerors base their offers on the estimates provided in the solicitation. According to Judge Parker, even though the GSA never guaranteed more than one hundred dollars worth of revenue, Travel Centre was extremely vulnerable to a defective government estimate. That is, “[b]y inducing Travel Centre to base its proposal on quantities that [the] GSA knew or should have known were overstated, [the] GSA breached its duty to deal with Travel Centre fairly and in good faith.”⁹⁴ In other words, the GSA entered into the contract with no intention of fulfilling its promise.⁹⁵

The GSBCA was divided both in its underlying decision and on the motion for reconsideration. Administrative Judge

86. 94 F.3d 1537 (Fed. Cir. 1996). In *Krygoski*, the Air Force awarded the plaintiff a contract to demolish an abandoned Air Force missile site in Michigan. During a predemolition survey, the plaintiff identified additional areas that were not included in the original government estimate that required asbestos removal. Due to the substantial cost increase related to additional asbestos removal, the contracting officer decided to terminate the contract for convenience and to reprocure the requirement. The plaintiff sued in the Court of Federal Claims, alleging a breach of the contract. Relying on *Torncello*, the trial court found that the government improperly terminated Krygoski’s contract. The court also found that the government abused its discretion in terminating the contract under the standard found in *Kalvar*. The Court of Appeals for the Federal Circuit reversed and remanded, holding that the Court of Federal Claims incorrectly relied upon dicta in the plurality opinion in *Torncello*. *Id.* at 1538. Specifically, the court concluded that the trial court improperly found the change of circumstances insufficient to justify termination for convenience. *Id.* at 1545. Although the government’s circumstances arguably had changed to meet even the *Torncello* plurality standard, the court declined to reach that issue, because *Torncello* only applies when the government enters into a contract with no intentions of fulfilling its promises. *Id.*

87. *Travel Centre*, 98-1 BCA ¶ 29,422.

88. GSBCA No. 5891, 82-1 BCA ¶ 15,479.

89. *Id.*

90. *Id.* ¶ 76,710.

91. *Travel Centre*, 98-1 BCA ¶ 29,422.

92. *Id.*

93. *Id.*

Joseph Vergilio offered a spirited dissent to both opinions. Judge Vergilio took exception with the underlying facts of the case as well as the case law relied upon in the majority opinion. He initially noted that Travel Centre obtained work in excess of the guaranteed minimum.⁹⁶ The contract was terminated for default (and later converted to a termination for convenience) because the contractor closed its business during the contract period after the government had satisfied the minimum quantity. Finally, Judge Vergilio took issue with the majority's opinion that the GSA's procurement officials acted in bad faith. He noted that "[t]he findings and record fall short of meeting the standard of 'well-nigh irrefragable proof' required to overcome the presumption of good faith dealing by the agency."⁹⁷ Judge Vergilio stated that the record does not identify any government official who may have possessed the information and been connected with the procurement.⁹⁸ Even if a government official learned that DOD-related agencies had entered into a separate travel service contract, the record does not show that the knowledge included the type or duration of the DOD contract. Major Wallace.

International and Operational Law Notes

The following note is the third in a series of practice notes⁹⁹ that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense Law of War Program.¹⁰⁰

Principle 2: Distinction

In its recent advisory opinion on the legality of the use of nuclear weapons, the International Court of Justice articulated what it categorized as the two "cardinal principles" of the law of war.¹⁰¹ One of these two principles was "distinction."¹⁰² This conclusion is not surprising. According to the official commentary to Geneva Protocol I,¹⁰³ the concept of distinguishing between lawful and unlawful targets is at the very foundation of virtually every provision of the contemporary law of war.¹⁰⁴ Indeed, simple reflection on the variety of prohibitions and mandates familiar to most judge advocate bears out this fact.

The common theme among the prohibitions and mandates is to ensure that the application of destructive military force is limited to the greatest extent possible to only those people, places, or things categorized as legitimate targets as the result of the existence of a state of hostilities. What the judge advocate often does not appreciate is the "quid pro quo" nature of this equation. It is international law that "legalizes" the application of destructive force to such "targets." As a result, international law creates an "immunity" for lawful combatants who commit such destructive acts directed at lawful targets. It is that same body of law, however, that mandates distinction between "lawful" and "unlawful" targets for preservation of the immunity that accompanies destroying lawful targets.¹⁰⁵

This principle was a central element in the first modern comprehensive code of regulations for land forces engaged in combat operations, The Lieber Code.¹⁰⁶ According to Lieber, the

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., JUNE 1998, at 17.

100. See U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). See also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

101. Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, *reprinted in* 35 I.L.M. 809, 827 (1996) [hereinafter Nuclear Weapons Opinion].

102. *Id.*

103. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 40 (1987) [hereinafter COMMENTARY].

104. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 9 (July 1956). See also RICHARD I. MILLER, THE LAW OF WAR 17-27 (1975). "Although it was never officially contained in an international treaty, the principle of *protection* and of *distinction* forms the basis of the entire regulation of war" COMMENTARY, *supra* note 103, at 586 (emphasis in original).

105. The concept of "combatant immunity" will be addressed in more detail in a subsequent note.

106. U.S. War Dep't., Adjutant Gen. Office, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field (24 Apr. 1863), *reprinted in* THE LAWS OF ARMED CONFLICT 3 (Dietrich Shindler & Jiri Toman eds., 3d. 1988).

distinction between private individuals of a hostile country and the armed forces of that country required that the “unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”¹⁰⁷ Ironically, explicit articulation of this principle in a multilateral law of war treaty did not occur until over one hundred years after publication of Lieber’s Code. The law of war practitioner will not find the term “distinction” in the articles of either the Hague Convention of 1907 or the four Geneva Conventions of 1949.¹⁰⁸ In spite of its apparent centrality in the development of the law of war, it remained “implied” within the meaning of many other provisions until 1977.

The first explicit articulation of the principle of distinction in a multi-lateral law of war treaty appeared as Article 48 of Additional Protocol I of 1977:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.¹⁰⁹

As is apparent from Article 48, the principle of distinction is intrinsically linked to the concept of “objective”—that is, in order to implement the obligation to distinguish between lawful and unlawful targets, military operations must be directed only at lawful military objectives.

In his chapter in the most recent volume of the International War Studies from the United States Naval War College, Horace

B. Robertson, Jr. traces the evolution of the explicit enunciation of the principle of military objective as a mechanism to implement the requirement of distinction.¹¹⁰ Robertson traces the Additional Protocol I mandate to direct military operations against only valid military objectives back to the Hague Rules of Air Warfare of 1923.¹¹¹ He demonstrates how articulation of the principle evolved between 1923 and 1977, when it was codified in both Articles 48 and 52 of Additional Protocol I. The language of Article 48 is established as the “basic rule.”¹¹² Article 52 is a further expression of the limitation imposed on combatants specifically within the context of protection of civilian persons and objects during international armed conflict. Accordingly, Article 52 establishes that:

Attacks shall be limited to strictly military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹¹³

Robertson proceeds to analyze whether this principle of military objective is part of the customary law of war.¹¹⁴ This is perhaps even more significant for the United States practitioner than his analysis of the history of this principle, because as he points out, the United States has never ratified, and therefore is not bound as a matter of treaty obligation to, Additional Protocol I.¹¹⁵ Robertson cites various statements of United States officials and provisions of United States law of war manuals to conclude that the United States is indeed bound to the general meaning of Articles 48 and 52, although he does identify one

107. THE LAWS OF ARMED CONFLICT, *supra* note 106, at 7.

108. See Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Art. 22, 36 Stat. 2277, *reprinted in* U.S. DEPARTMENT OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) (reprinting Article 22 of The Lieber Code) [hereinafter DA PAM 27-1]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2-3, T.I.A.S. No. 3362 [hereinafter GWS], *reprinted in* DA PAM 27-1, *supra*; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3363 [hereinafter GWS Sea], *reprinted in* DA PAM 27-1, *supra*; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3364 [hereinafter GPW], *reprinted in* DA PAM 27-1, *supra*; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3365 [hereinafter GC], *reprinted in* DA PAM 27-1, *supra*; 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter GP I]; 1977 Protocol II Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter GP II].

109. GP I, *supra* note 108, art. 48.

110. Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in THE LAW OF MILITARY OPERATIONS 197 (Michael N. Schmitt ed., 1998).

111. HAGUE RULES OF AIR WARFARE, drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 106, at 207.

112. GP I, *supra* note 108, art. 48.

113. GP I, *supra* note 108, art. 52.

114. Robertson, Jr., *supra* note 110, at 203.

115. *Id.* at 203-04.

definitional nuance on which the United States may have staked out a different position.¹¹⁶

Among the authorities cited by Robertson to support the conclusion that the United States is bound to these provisions as a matter of customary international law are statements by Michael Matheson, Deputy Legal Advisor to the Department of State, and Abraham D. Sofaer, Legal Advisor to the Department of State, at a conference co-sponsored by the Red Cross and devoted to analyzing the status of the additional protocols. Mr. Matheson articulated which provisions of Additional Protocol I the United States felt did not reflect customary international law.¹¹⁷ By implication, those which he did not identify were not objectionable to the United States. Mr. Sofaer focused specifically on provisions of Additional Protocol I that the United States considers to be beyond the scope of binding customary international law.¹¹⁸ The only provision of Additional Protocol I related to distinction that he identified as objectionable at that time was the prohibition against making civilians the object of reprisal.¹¹⁹

The conclusion justified by the sources cited above is that the principle of distinction, as implemented by the principle of military objective, do indeed form part of the customary law of war related to international armed conflict (and arguably internal armed conflict as well).¹²⁰ Among the many “principles” of the law of war, distinction lies at the very core. It is a principle that focuses on limiting the destruction caused by conflict between warring armed forces. This should not, however, result in the conclusion that it is inapplicable to military operations other than war (MOOTW) that do not rise to the level of armed conflict. The true essence of the principle of distinction, as implemented by the “military objective” rule, is that combatants in any situation must constantly endeavor to ensure that warlike acts are not directed against anyone or anything that does not qualify as a legitimate target.

Implementing this imperative would seem facilitated by a clearly identified hostile force, enabling the combatant to make

the necessary distinction between lawful and unlawful targets more readily. This fact is explicitly acknowledged in the language of Article 44 of Additional Protocol I: “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”¹²¹ Additional Protocol I then indicates that this obligation only requires, at a minimum, that a combatant distinguish himself as such “during each military attack”¹²² or “during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”¹²³ This “minimalist” standard for determining who qualifies as a lawful combatant by distinguishing themselves as such was rejected by the United States as an unjustified modification of the customary law standard for establishing combatant status.¹²⁴ This rejection may be viewed as evidence of how seriously the United States considers the need to be able to make the critical distinction between combatants and non-combatants. The obligation to make such distinctions should not be considered as having been eliminated when making such distinctions becomes more difficult as the result of facing a “non-traditional” hostile force that does not adequately distinguish itself from civilians. Instead, it would be central to the question of whether such an adversary, upon capture, was entitled to treatment consistent with prisoner of war status.

A classic example of the need to carry this principle over to the MOOTW environment was Somalia. Faced with a hostile force that was virtually indistinguishable from the local civilian population, United States forces continued to attempt to make distinctions between lawful and unlawful targets based on the distinguishing factors available, which often amounted to little more than identifying a hostile act directed towards United States forces. Based on the United States rejection of the Additional Protocol I standard for combatant status, even if the conflict had amounted to an international armed conflict triggering the full body of the law of war, these adversaries would never have technically qualified for prisoner of war status upon cap-

116. *Id.* at 204 (citing Michael Matheson (Deputy Legal Advisor, U.S. Department of State), *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U. J. INT’L L. & POL’Y 419, 426 (1987)).

117. *See* Matheson, *supra* note 116, at 419.

118. *Id.* at 460.

119. *Id.* at 469.

120. *See* Prosecutor v. Dusko Tadic a/k/a/ “Dule,” *Opinion and Judgment*, INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, Case No. IT-94-1-T (7 May 1997) (analyzing the applicability of customary international law of war principles to conflicts not of an international nature).

121. GP I, *supra* note 108, art. 44(3).

122. *Id.* art. 44(3)(a).

123. *Id.* art. 44(3)(b).

124. *See* Matheson, *supra* note 116, at 419.

ture as a matter of law. The United States forces, however, did not use this fact to reject the imperative of attempting to make the critical distinction between “combatant” and “non-combatant.” This is the essence of the principle of distinction, a principle that must always form the foundation of the war-fighter’s decision-making process. Major Corn.

1998 Operational Law Handbook Now Available

The 1998 edition of the *Operational Law Handbook* is now available for distribution. Students who attend the Operational Law Seminar will receive copies, and the school has a limited number of hard copies available for distribution on an as-needed basis. The *Operational Law Handbook* is a “how to” guide for judge advocates who practice operational law. It provides references and describes tactics and techniques for the practice of operational law. The *Operational Law Handbook* is not a substitute for official references. Like operational law itself, the *Handbook* is a focused collection of diverse legal and practical information. The *Handbook* is not intended to provide “the school solution” to a particular problem, but is designed to help judge advocates recognize, analyze, and resolve the problems they encounter in the operational context.

The *Handbook* was designed and written for judge advocates who practice operational law. The size and contents of the *Handbook* are controlled by this focus. Simply put, the *Handbook*, is a “cargo pocket sized” reference made for all service members of the judge advocate general’s corps, who serve alongside their clients in the operational context. Accordingly, the *Operational Law Handbook* is compatible with current joint and combined doctrine.

The proponent for this publication is the International and Operational Law Department, The Judge Advocate General’s School (TJAGSA). Anyone who has comments, suggestions, and work product from the field should send them to TJAGSA, International and Operational Law Department, Attention: Major Mike Newton, Charlottesville, Virginia 22903-1781. To gain more detailed information or to discuss an issue with the author of a particular chapter, practitioners should call Major Newton at DSN 934-7115, ext. 373 or commercial (804) 972-6373 or e-mail at: newtoma@hqda.army.mil.

The 1998 *Operational Law Handbook* is on the Lotus Notes Database in two locations. The “Int’l and Opn’l Law1” database on the TJAGSAN1 server contains a digital file for each chapter of the *Handbook*. To access, open the database and view documents by title. The 1998 edition is also linked to the CLAMO General database under the keyword “Operational

Law Handbook–1998 edition.” The digital copies are particularly valuable research tools because they contain many hyper-text links to references in the text, such as treaties; statutes; DOD directives, instructions, and manuals; Chairman, Joint Chiefs of Staff instructions; joint publications; Army regulations; and field manuals. For a blue link, the user should click on it and Lotus Notes will retrieve the cited document from the Internet. The hypertext linking is an ongoing project and will only get better with time. Some internet links require that your computer have specific types of software. Major Newton.

Criminal Law Note

Explanation of the 1998 Amendments to the *Manual for Courts-Martial*

Introduction

The July 1998 edition of *The Army Lawyer* contained a complete copy of the 1998 amendments to the *Manual for Courts-Martial (MCM)*. This note highlights the numerous amendments made to the *MCM* and the impact the amendments may have for military criminal law practitioners.¹²⁵

Pretrial Restraint

Amended Rule for Courts-Martial (R.C.M.) 305(g) through (k) reflects the constitutional requirement for a neutral and detached officer to review an accused’s pretrial confinement within forty-eight hours of imposition.¹²⁶ Amended R.C.M. 305(h)(2)(A) notes that the existing seventy-two-hour commander’s review may satisfy this requirement if it is conducted within forty-eight hours and if the commander is truly neutral and detached. This same provision also notes that nothing prohibits the neutral and detached officer from conducting either the seventy-two-hour review or the forty-eight-hour review immediately after an accused is ordered into pretrial confinement.

To clarify the *Manual’s* distinct neutral and detached review requirements, R.C.M. 305(i) was broken into two subparts: (1) the forty-eight-hour review conducted by a neutral and detached officer and (2) the seven-day review conducted by a neutral and detached officer appointed in accordance with applicable service regulations (for example, the military magistrate provisions in *Army Regulation 27-10*¹²⁷). Although listed as two separate reviews, if the seven-day reviewing officer (that is, the military magistrate) conducts his review within forty-eight-hours, it may satisfy both review requirements.

125. Executive Order Number 13,086 contains the recent amendments to the *MCM*. See Exec. Order No. 13,086, *reprinted in* ARMY LAWYER, July 1998, at 1.

126. See *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert denied*, 114 S. Ct. 1296 (1994). In *Rexroat*, the court held that the 48-hour review required by *County of Riverside v. McLaughlin* applies to the military. *Id.* See *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

127. U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (24 June 1996).

The provisions of R.C.M. 305(k) were also amended to expand the remedial powers of the military judge. In addition to the existing authority to order credit for noncompliance with subsections (f), (h), (i), and (j) of this rule, military judges may now order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.

Pre-Trial Investigations

Based on the National Defense Authorization Act for Fiscal Year 1996,¹²⁸ R.C.M. 405(e) was amended to reflect the additional authority of pretrial investigating officers to investigate an uncharged offense and to make recommendations as to its disposition, even when formal charges for the offense have not been preferred. The discussion to amended R.C.M. 405(e) states that Article 32b investigations into uncharged offenses may occur only when the accused has been put on notice of the general nature of the uncharged offense and afforded the same opportunity to be represented, to cross-examine witnesses, and to present evidence afforded soldiers during investigations of charged offenses. The analysis to amended R.C.M. 405(e) acknowledges the benefit to the government and to the accused as a result of the improved judicial economy resulting from the amended rule.

Speedy Trial

Based on new rules regarding hospitalization of an incompetent accused, subsection (E) was added to R.C.M. 707(b)(3) to specify that the period of time when an accused is committed pursuant to R.C.M. 909(f) shall be excluded for purposes of the 120-day speedy trial clock. If the accused is later returned to the custody of the general court-martial convening authority (GCMCA), a new 120-day clock will begin on the date the accused is returned to custody. Rule for Courts-Martial 707(c) was also amended to accommodate this change by adding the additional provision that all periods of time during which an accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded.

Government Appeals

The 1998 amendment to R.C.M. 908(a) expands the grounds for which the United States may appeal a military judge's order or ruling. Previously, the United States could only appeal an order or ruling that terminated the proceedings with respect to a charge or specification, or that excluded evidence that was substantial proof of a material fact. The amendment now permits the United States to appeal a military judge's order or ruling that affects the disclosure or nondisclosure of classified information. This change conforms to the 1996 change to Arti-

cle 62, UCMJ. The term "classified information" is defined in the 1998 amendment to R.C.M. 103, discussion, subsection (14).

Automatic Forfeitures

The amendments to R.C.M. 1101 set forth the requirements for deferment and waiver of automatic forfeitures. Automatic forfeitures arise under Article 58b, UCMJ, when a court-martial sentence includes more than six months confinement or a punitive discharge along with any confinement.

Amended R.C.M. 1101(c)(2) provides that, "upon written application of the accused," the convening authority may defer forfeitures. Amended R.C.M. 1101(c)(3) sets forth the factors for the convening authority to consider when deciding whether to defer an accused's forfeitures. Amended R.C.M. 1101(c)(4) requires that the deferment be reported in the convening authority's action.

Amended R.C.M. 1101 contains a new subparagraph (d), which addresses waiver of automatic forfeitures "to provide for dependent support." Amended R.C.M. 1101(d)(1) highlights a key—and often-overlooked—distinction between deferment and waiver. Waiver applies to "forfeiture of pay and allowances resulting only by operation of law." Thus, if a court-martial sentence does not include one of the triggers in Article 58b, waiver does not apply.

The waiver provisions in R.C.M. 1101(d)(1) further provide that the convening authority may waive such forfeitures when they become effective by operation of Article 57(a), which occurs fourteen days after sentence is adjudged. Subparagraphs (2) and (3) set forth factors that a convening authority may consider in granting waiver and establish eligible dependents to whom the convening authority may direct such waived benefits be paid.

Competency to Stand Trial/Mental Responsibility

Amended R.C.M. 909 details the new procedures to commit an incompetent accused to the custody of the U. S. attorney general under Article 76b, UCMJ. Commitment of an incompetent accused is not discretionary. According to R.C.M. 909(d) and R.C.M. 909(c), the convening authority must commit the accused to the attorney general if the military judge determines that the accused is incompetent (post-referral) or if the GCMCA concurs with a sanity board's findings (pre-referral) that the accused is incompetent. Rule for Courts-Martial 909(e) details the incompetency hearing. Pursuant to the requirements of R.C.M. 909(f), military accuseds shall be hospitalized using the same procedures applied to federal defendants who are found incompetent to stand trial.

128. Pub. L. No. 104-106, § 1131, 110 Stat. 186, 464 (1996).

Amended R.C.M. 909 also addresses speedy trial issues that affect R.C.M. 707(b)(3)'s 120-day speedy trial clock. Amended R.C.M. 909(g) now specifies that the period of time during which an accused is committed to the custody of the attorney general under Article 76b and R.C.M. 909(f) is excludable for speedy trial purposes. If the accused is later found competent and returned to the custody of the GCMCA, then a new 120-day time period begins on the date of the return to custody.

The 1998 amendments also include a completely new section, R.C.M. 1102A, which provides guidance for the post-trial handling of accuseds who are found not guilty only by reason of lack of mental responsibility. Under R.C.M. 916(k), an accused who is found not guilty by reason of lack of mental responsibility will be committed to the custody of the attorney general, unless the accused can prove that commitment is not necessary. Rule for Courts-Martial 1102A(c) sets forth the procedures for the post-trial hearings before the military judge. The post-trial hearing is held within forty days of the court-martial findings. At the hearing, the burden is on the accused to show that his release would not create a substantial risk of bodily injury to another person or serious damage to the property of another person due to a present mental disease or defect. The accused's burden varies, depending on the offense(s) he committed.¹²⁹

Amended R.C.M. 1107(b)(4) explains that when a court-martial finds an accused not guilty only by reason of lack of mental responsibility, the convening authority shall commit the accused to a suitable facility pending his post-trial R.C.M. 1102A hearing. This new provision ensures that the accused will be available for his post-trial hearing.

Military Rules of Evidence

Military Rule of Evidence (M.R.E.) 1102 was changed to make amendments in the Federal Rules of Evidence (F.R.E.) automatically applicable to the Military Rules of Evidence eighteen months after the effective date of the federal amendments, unless the President takes action to the contrary. Under the former rule, changes were automatically incorporated into the M.R.E. six months after the effective date of a new federal rule.

Federal Rules of Evidence 407, 801, 803, 804, and 807 were amended on 1 December 1997. These amendments were scheduled to take effect in the military on 1 June 1998. Since M.R.E. 1102 was amended on 27 May 1998, however, these F.R.E. amendments will not be included in the 1998 edition of the *MCM*.

In addition to this significant change to M.R.E. 1102, several minor amendments were made to M.R.E. 412 regarding an alleged victim's behavior or sexual predisposition. All references to civil proceedings were deleted. Amended M.R.E. 412(c)(1)(A) requires parties who seek to offer evidence of an alleged victim's sexual behavior or sexual predisposition to file a written motion at least five days prior to the entry of pleas. The former rule required notice fourteen days before trial. Pursuant to Article 39(a), UCMJ, M.R.E. 412(c)(B)(2) was amended to replace the term "hearing in camera" with "closed hearing" to reflect that an in camera hearing in federal district court closely resembles a closed hearing under Article 39(a). Military Rule of Evidence 412 sections (d) and (e) were added to define the terms "sexual behavior" and "nonconsensual sexual offense."

Several changes were also made to M.R.E. 413 and M.R.E. 414 to tailor the rules to military practice. Military justice terminology was substituted, and all references to F.R.E. 415 were deleted because it applies only to civil proceedings. Sections (b) of M.R.E. 413 and M.R.E. 414 were amended to require the government to disclose evidence of similar crimes at least five days before the scheduled date of trial. The federal rule requires a fifteen-day notice. Amended M.R.E. 413(d) adds the phrase "without consent" to specifically exclude the introduction of evidence concerning adultery or consensual sodomy. Sections (e), (f), (g), and (h) were added to M.R.E. 413 and M.R.E. 414 specifically to define the terms "sexual act," "sexual contact," "sexually explicit conduct," and "state."

Crimes and Defenses

The 1998 amendments to part IV of the *MCM* reflect significant changes to punitive articles that expand criminal liability in several specific areas, create a new special defense to carnal knowledge, and enumerate parole violations as an offense under Article 134. These changes incorporate recent statutory amendments to the UCMJ and reflect the use of presidential authority to promulgate the R.C.M. under Article 36 and to establish maximum punishments under Article 56.

Paragraph 19 of part IV incorporates a 1996 amendment to Article 95, UCMJ. Although the 1951, 1969, and 1984 *MCMs* maintained that mere flight was a violation of Article 95, the Court of Appeals for the Armed Forces (CAAF) had rejected that interpretation. In *United States v. Harris*¹³⁰ and *United States v. Burgess*,¹³¹ the CAAF held that flight alone did not constitute resisting apprehension under Article 95. The 1996 amendment supersedes *Harris* and *Burgess* and creates a separate offense of fleeing apprehension. The maximum punish-

129. If the offense(s) involved an injury or risk of injury to another person or serious damage (or risk of serious damage) to another's property, the accused's burden of proof is clear and convincing evidence. With respect to all other offenses, the accused's burden of proof is a preponderance of the evidence.

130. 29 M.J. 169 (C.M.A. 1989).

131. 32 M.J. 446 (C.M.A. 1991).

ment for fleeing apprehension is a bad-conduct discharge, total forfeitures, and confinement for one year—the same as for resisting apprehension.

Paragraph 45 of part IV incorporates the 1996 statutory amendments to the offense of carnal knowledge under Article 120. Article 120(b) was amended to make carnal knowledge a gender-neutral crime. This change expands liability to include female perpetrators, though the accused and victim must still be of opposite genders.¹³² The amendments also added Article 120(d), which allows mistake of fact as to the age of the victim as a defense in cases of carnal knowledge.¹³³ Under the amended statute, the defense is available only if the victim had attained the age of twelve at the time of the offense and the accused had an honest and reasonable belief that the victim was sixteen or older at the time of the offense. Contrary to the normal allocation of burdens, the accused has the burden of proving the defense by a preponderance of the evidence. The government is not required to prove that the accused knew the victim's age as part of the case-in-chief, but must be prepared to rebut the defense evidence that tends to support an honest and reasonable mistake defense. The 1998 amendments to R.C.M. 916(j) (defining the mistake of fact defense) and R.C.M. 920(e)(5)(D) (allocating burdens of proof) complete the implementation of these statutory changes.

Paragraph 45 of part IV was amended to increase the maximum punishment for simple assaults committed with an unloaded or inoperative firearm. The President added this sentence escalator in recognition of the increased psychological harm suffered by victims who are assaulted with apparently functional firearms. The *MCM* has maintained since 1951 that an unloaded or nonfunctional firearm is not a “dangerous weapon” under Article 128(b). The CAAF agreed with this position in *United States v. Davis*,¹³⁴ holding that an offer-type assault with an unloaded pistol was not an aggravated assault under Article 128.¹³⁵ The 1998 change ameliorates the impact of the *Davis* decision by permitting enhanced punishments for this special category of simple assaults.

The 1998 amendments also create paragraph 97a, which defines parole violations as an offense under Article 134. Violation of parole has been noted in the table of maximum punishments in every edition of the *MCM* since the enactment of the UCMJ, but it has never been included as an enumerated offense in part IV of the *MCM*. The 1998 change provides practitioners with a delineation of elements, an explanation of the offense, and a model specification to apply Article 134 to parole violations.

Rule for Courts-Martial 1105(b) addresses the matters that an accused may submit to the convening authority. Amended R.C.M. 1105(b) is rephrased to ensure that all parties understand that an accused is permitted to submit any matters, including non-written matters, as part of a clemency submission. Although the amended rule clarifies the accused's right to submit non-written matters, it does not create an obligation upon the convening authority to consider these non-written matters. Pursuant to R.C.M. 1105(b)(1), the convening authority is only required to consider written submissions.

Formerly, R.C.M. 1105(b) provided that an accused could submit “any written matters” that might affect the convening authority's decision. The provision unduly restricted the accused's right to submit matters to the convening authority. Amended R.C.M. 1105(b) is more appropriate in the highly discretionary realm of post-trial action and clemency. It permits an accused to submit any matters that might help obtain clemency, while it leaves the decision whether to consider such non-written matters to the individual discretion of the convening authority on a case-by-case basis.

Rule 1203(c)(1) was amended to reflect the creation of Article 57a of the UCMJ. The new rule authorizes a service secretary to defer confinement when a sentence has been set aside by a service court of criminal appeals and a judge advocate general certifies the case to the Court of Appeals for the Armed Forces for further review under Article 67(a)(2). The analysis accompanying the rule recognizes that an accused should be released from confinement unless it can be shown that the accused is a flight risk or a threat to the community.

A significant amendment was also made to R.C.M. 1210(a) regarding an accused's right to petition for a new trial. A new provision was added that prohibits an accused from petitioning for a new trial “when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.” This addition was intended to conform to the interpretations of Federal Rule of Criminal Procedure 33.

Vacation Proceedings

Amended R.C.M. 1109 clarifies the powers of the special court-martial convening authority to vacate any portion of a suspended special court-martial sentence other than an approved bad-conduct discharge. The amended rule catego-

132. Carnal knowledge, like rape, only applies to only heterosexual intercourse. Homosexual acts must be charged under Article 125.

133. The mistake of fact defense, generally defined in R.C.M. 916(j), could not be judicially applied to carnal knowledge because knowledge of the victim's age is not an element of the offense under Article 120(b). A statutory amendment was therefore required to make this defense available.

134. 47 M.J. 484 (1998).

135. *Id.*

rizes the vacation of certain suspended punishments into four categories: sub-paragraph (d) vacation of suspended general court-martial sentence; sub-paragraph (e) vacation of a suspended special court-martial sentence wherein a bad-conduct discharge was not adjudged; sub-paragraph (f) vacation of a suspended special court-martial sentence that includes a bad-conduct discharge; and sub-paragraph (g) vacation of a suspended summary court-martial sentence. The former rule had two categories of cases and provided confusing guidance regarding the types of punishments a special court-martial convening authority could vacate.

Under the old provision, only the GCMCA could vacate any portion of a suspended sentence that included a bad-conduct discharge, even if the portion of the sentence he desired to vacate was nothing more than additional confinement, forfeitures, or reduction in rank. The amended rule now permits a

special court-martial convening authority to vacate these other types of punishments even in those cases when the adjudged sentence includes a bad-conduct discharge.

Contempt

Amended R.C.M. 809 modernizes military contempt procedures. The rule now vests contempt powers in the military judge alone and removes the members' involvement in the process. The military judge will conduct the proceedings in all cases, outside the presence of the members. The amendment also provides that the court-martial proceedings need not be suspended while the contempt proceedings are conducted. Criminal Law Faculty.